

**RECONCEPTUALISING DOMESTIC ARBITRATION:**  
**INTRODUCTION OF FOREIGN NON-SIGNATORIES IN DOMESTIC**  
**ARBITRATION**

**I. INTRODUCTION**

Domestic arbitration in India has traditionally been conceived within a self-contained framework: one defined by Indian parties, governed by Indian law and supervised by Indian courts. This territorially anchored model operated on the assumption of a closed system leaving limited scope for foreign participation. However, this assumption has progressively weakened in recent years. The increasing involvement of foreign entities particularly non-signatories to arbitration agreements, in proceedings that are otherwise domestic reflects a clear shift from rigid territorial classifications towards a more functional and commercially responsive approach.

This shift is rooted in the jurisprudential development of the group of companies doctrine and its variants which enable arbitral tribunals to bind non-signatories where a clear intention to arbitrate can be inferred from the composite nature of the transaction. The decision of Hon’ble Supreme Court in *Cox and Kings Ltd. v. SAP India Pvt. Ltd*<sup>1</sup> (“**Cox and Kings case**”). represents a decisive moment in this evolution. The Hon’ble Supreme Court clarified that arbitration agreements are not strictly confined to their signatories and may extend to entities that are functionally and integrally involved in the underlying contractual arrangement.

The introduction of foreign parties into what would otherwise qualify as domestic arbitration unsettles the conventional architecture of Indian arbitration law. It exposes an unresolved tension between competing legal principles, that is on one hand the statutory classification of arbitrations as “domestic,” and on the other hand the expanding scope of party inclusion driven by commercial realities and judicial innovation.

At a practical level, this transformation introduces complexity into arbitral proceedings requiring stakeholders to navigate unfamiliar legal and procedural considerations. In the contemporary landscape where cross-border corporate structures, parent-subsidiary relationships and offshore operational dependencies are commonplace, evolution of law is

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<sup>1</sup> Cox and Kings Ltd. v. SAP India Pvt. Ltd (2024) 4 SCC 1.

necessitated. The gradual expansion of arbitration doctrine in India reflects an attempt to align legal principles with the demands of modern commercial practice.

## **II. LEGAL ARCHITECTURE AND INTERPRETIVE CHALLENGES UNDER THE ARBITRATION AND CONCILIATION ACT, 1996**

The Arbitration and Conciliation Act, 1996 (“Act”) adopts a two-fold classification of arbitrations. It distinguishes between domestic arbitration and international commercial arbitration (“ICA”), as defined under Section 2(1)(f) of the Act. This classification primarily depends on the identity of the parties including their nationality, residence, and place of business.

However, this framework becomes less clear when non-signatories are involved. The inclusion of such parties blurs established doctrinal boundaries and introduces uncertainty into the arbitral process. The definition of “party” under Sections 2(1)(h) and 7 of the Act permits interpretive expansion according to the Cox and Kings case<sup>2</sup>, that leads to a system which includes non-signatories in its classification process. As a result, entities that have not formally signed the arbitration agreement may still be treated as parties.

This interpretation creates practical challenges, raising questions regarding the classification of arbitrations at the outset and the authority competent to determine whether a non-signatory is bound by the arbitration agreement. Clarifying that, the Hon’ble Supreme Court in Cox and Kings case<sup>3</sup> held that at the referral stage courts should not conclusively determine this issue. Instead, the arbitral tribunal should decide whether a non-signatory is bound by the arbitration agreement.

The Act delineates distinct procedural regimes drawing a clear distinction between domestic arbitration and international commercial arbitration:

1. Section 11- The appointing authority varies depending on whether the arbitration qualifies as an international commercial arbitration or a purely domestic one.
2. Section 28- Domestic arbitrations are mandatorily governed by Indian substantive law unlike international commercial arbitrations where party autonomy is preserved.

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<sup>2</sup> Ibid

<sup>3</sup> Ibid

3. Section 29- The imposition of strict timelines for completion of proceedings applies exclusively to domestic arbitrations.
4. Section 34- The ground of “patent illegality” is available only for challenging domestic arbitral awards.

The system requires parties to follow established rules for classification yet, the system becomes unstable when the distinctiveness of “parties” involved becomes questionable.

### III. FROM DOMESTIC TO INTERNATIONAL: SHIFTING JURISDICTIONAL BOUNDARIES

As the introduction of a foreign party raises a basic foundation question: *when does a domestic arbitration transform into an international commercial arbitration ?*

For better understanding, the issue may be understood through two competing approaches:

1. **Ex-ante approach**: The character of the arbitration is determined based on the identity of the original signatories. This approach prioritises procedural certainty and predictability from the very beginning of the proceedings.
2. **Ex-post approach**: The classification remains fluid and is assessed throughout the arbitral process culminating in the tribunal’s determination on whether non-signatories are bound. This approach aligns the nature of arbitration with the substantive realities of the dispute and the parties involved.

The Indian legal system seems to support the second preference because under Section 16 of the Act whereby the principle of *kompetenz-kompetenz* is recognised. The legal system now faces a dual existence because the current situation cannot be viewed only as a conceptual problem.

Indian courts, in recent years have clarified the legal position regarding the inclusion of non-signatories, particularly in the context of jurisdictional determination. In *ONGC Ltd. v. Discovery Enterprises Pvt. Ltd.*<sup>4</sup>, the Hon’ble Supreme Court laid down a structured set of factors to determine whether a non-signatory can be bound by an arbitration agreement. These include the intention of the parties, the relationship between the entities, the composite nature of the transaction and the manner in which the contract has been performed. This marked a

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<sup>4</sup> ONGC Ltd. v. Discovery Enterprises Pvt. Ltd (2022) 8 SCC 42

shift towards a more substance-oriented approach where the focus is on the commercial reality of the transaction rather than the formal status of signatories.

This approach has been further resonated in *ASF Buildtech Pvt. Ltd. v. Shapoorji Pallonji & Co. Pvt. Ltd.*<sup>5</sup>, where the Hon'ble Supreme Court recognised that an arbitral tribunal has the power to implead non-signatories as part of its jurisdiction under Section 16 of the Act. The Hon'ble Supreme Court emphasised that such determinations often involve mixed questions of fact and law and are therefore best left to the arbitral tribunal, particularly in cases involving interconnected agreements and group entities.

Similarly, in *HPCL v. BCL Secure Premises Pvt. Ltd.*<sup>6</sup>, the Hon'ble Supreme Court clarified that while courts exercising jurisdiction under Section 11 of the Act may undertake a prima facie examination, they must avoid detailed adjudication on whether a non-signatory is bound. That determination especially in complex multi-party transactions, lies within the domain of the arbitral tribunal.

Concurrently, the Apex Court has also recognised limits to this expansion. In *Reckitt Benckiser (India) Pvt. Ltd. v. Reynders Label Printing (India) Pvt. Ltd.*<sup>7</sup>, the Hon'ble Supreme Court refused to treat a foreign entity as a party to the arbitration in the absence of a binding arbitration agreement. The Hon'ble Supreme Court held that mere commercial association or involvement in the broader transaction is insufficient to confer jurisdiction, particularly at the stage of appointment under Section 11 of the Act. This decision underscores that while Indian law has moved towards flexibility, the requirement of consent remains central.

These developments give rise to a structural difficulty when it comes to the impleadment of a foreign non-signatory. At the initial stage, a High Court may treat the arbitration as domestic based on the identity of the original signatories and proceed to appoint an arbitrator. However, during the course of proceedings the arbitral tribunal may conclude that a foreign non-signatory is in fact bound by the arbitration agreement. This has the effect of altering the character of the arbitration from domestic to international commercial arbitration.

Such a shift creates uncertainty in the procedural framework. Orders passed at the initial stage, including those relating to jurisdiction or appointment may come into question. More

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<sup>5</sup> *ASF Buildtech Pvt. Ltd. v. Shapoorji Pallonji & Co. Pvt. Ltd* (2025) SCC Online SC 1016

<sup>6</sup> *HPCL v. BCL Secure Premises Pvt. Ltd.*, 2025 SCC OnLine SC 2746

<sup>7</sup> *Reckitt Benckiser (India) Pvt. Ltd. v. Reynders Label Printing (India) Pvt. Ltd.* (2019) 7 SCC 62.

importantly, the applicable legal regime may itself become unclear, affecting issues such as governing law, procedural timelines and the scope of judicial intervention.

This instability has broader implications. It opens the door to jurisdictional challenges at multiple stages, increases the risk of collateral proceedings and undermines procedural efficiency. The law is therefore required to balance two competing considerations i.e., the need to reflect commercial reality by including all relevant parties and the need to maintain certainty and consistency in arbitral proceedings.

#### **IV. ENFORCEMENT AND JUDICIAL RESPONSE: NAVIGATING THE NEW YORK CONVENTION AND ROLE OF THE SUPREME COURT OF INDIA**

The complexities introduced at the stage of constitution of the tribunal are further amplified at the enforcement stage. The introduction of a foreign element transforms what would otherwise be a purely domestic enforcement exercise into one that must operate within an international framework. Although awards rendered in international commercial arbitrations seated in India are not classified as foreign awards under Part II of the Arbitration and Conciliation Act, 1996, they nevertheless carry an international dimension that affects their enforceability across jurisdictions.

The New York Convention<sup>8</sup> impose a pro-enforcement requirement limiting judicial interference to narrowly defined grounds. However, difficulties arise where the classification of an arbitration as either domestic or international remains contested. In such situations, the coexistence of remedies under Section 34 of the Act (setting aside of awards) and Convention-based defences in foreign jurisdictions creates a fragmented and overlapping enforcement landscape at certain times.

The Hon'ble Supreme Court of India has over time attempted to bring doctrinal clarity to this area. In *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*,<sup>9</sup> the The Hon'ble Supreme Court significantly narrowed the scope of "patent illegality" as a ground for setting aside domestic awards thereby aligning Indian law more closely with international standards. Prior to that, in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*,<sup>10</sup> the Hon'ble

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<sup>8</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

<sup>9</sup> *Ssangyong Engineering & Construction Co. Ltd. v. NHAI* (2019) 15 SCC 131.

<sup>10</sup> *BALCO v. Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552.

Supreme Court firmly endorsed the principle of territoriality anchoring arbitral proceedings to the juridical seat and delineating the supervisory role of Indian courts.

Hence, the inclusion of foreign non-signatories complicates the application of both these principles. While the arbitral seat may remain in India, the nature of the arbitration and consequently the scope of judicial intervention may become uncertain. This evolving landscape underscores a fundamental tension between territorial classification and functional realities leaving enforcement jurisprudence in a state of calibrated but incomplete transition.

#### **V. COMMERCIAL REALITIES AND THE FUTURE TRAJECTORY OF ARBITRATION IN INDIA**

The doctrinal evolution is driven by commercial necessity. The contemporary business transactions are structured across multiple entities with contractual obligations often performed by affiliates and related parties that are not formal signatories to the agreement.

The admission of foreign parties through implement serves essential purposes because it enables the following objectives to be reached:

1. The process unites all legal conflicts into a single resolution;
2. The process prevents different judgments from being issued;
3. The process acknowledges the economic connection that exists between different companies within the corporate group.

Thus, parties design arbitration agreements within a defined procedural framework intending to create a stable and predictable domestic arbitral regime. This structure, however is unsettled when non-signatories, particularly international non-signatories are drawn into the process. The comparative jurisprudence offers only limited guidance in navigating this disruption. For instance, English courts have traditionally adopted a strict approach requiring clear consent and a direct legal relationship before extending arbitration agreements to non-signatories.<sup>11</sup> By contrast, India appears to occupy a middle ground recognising broader doctrinal principles that permit such extensions while simultaneously constraining their application through cautious judicial scrutiny.

The future trajectory of arbitration in India will depend significantly on judicial clarification across two critical dimensions. The first dimension requires determination of the specific stage

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<sup>11</sup> Peterson Farms Inc. v. C&M Farming Ltd., [2004] EWHC 121 (Comm).

when arbitration status shall be established as either domestic or international commercial. The second dimension requires maintenance of jurisdictional consistency during interim proceedings when arbitration status remains unclassified.

## **VI. CONCLUSION**

The introduction of international parties into Indian domestic arbitration procedures represents an essential change which transforms existing practices. The situation requires a re-evaluation of basic principles which support the Act because the domestic arbitration and international commercial arbitration sections need to be re-evaluated.

The developing position of the Hon'ble Supreme Court and its subordinate courts reflects a clear judicial shift from formalism to substance. Courts now prioritise the underlying commercial reality over the mere form of contractual arrangements recognising that consent to arbitrate may be inferred from the conduct of parties and the structure of their business relationships rather than confined strictly to the four corners of a signed agreement.

However, this doctrinal expansion sits uneasily with the existing statutory framework which continues to rely on binary classifications of arbitration as domestic or international in order to determine critical procedural consequences. The resulting uncertainty is not merely theoretical as it has tangible implications. For instance, questions of jurisdiction, applicability of procedural timelines and the scope of judicial intervention become increasingly complex thereby complicating the enforcement landscape. The current dissonance between judicial innovation and legislative structure risks undermining that coherence. In the coming times, there is a pressing need to articulate clearer thresholds for the extension of arbitration to international non-signatories. Pertinently, the legislature must also recalibrate the statutory framework to better reflect the realities of contemporary commercial practice.